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Industrial Telecommunications Association, Inc.

June 10, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: WT Docket No. 95-157; Notice of Written *Ex Parte* Presentation

Dear Mr. Caton:

On this date, the Industrial Telecommunications Association, Inc. ("ITA") delivered a written *ex parte* presentation regarding various issues raised in petitions for reconsideration and/or clarification in the above-referenced proceeding to David Furth, Esq., Chief of the Commercial Wireless Division, Wireless Telecommunications Bureau.

In accordance with Section 1.1206(a) of the Commission's rules and regulations, I am hereby submitting two copies of the written *ex parte* presentation for inclusion in the public record.

Very truly yours,

Mark E. Crosby
President and Chief
Executive Officer

Enclosures

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List A B C D E

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Industrial Telecommunications Association, Inc.

June 10, 1997

Mr. David Furth
Chief, Commercial Wireless Division
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Re: WT Docket No. 95-157; *Ex Parte* Presentation

Dear Mr. Furth:

The Industrial Telecommunications Association, Inc. (ITA) submits this *ex parte* presentation to address various issues that are the subject of petitions for reconsideration and/or clarification filed in response to the *Second Report and Order* in the above-referenced proceeding.[1]

I. Statement of Issues

Having closely followed developments regarding the matters raised in the various petitions for clarification and/or reconsideration, ITA finds that there are five issues of significance relating to the reconsideration/clarification requests:[2]

1. Should self-relocating incumbents be eligible for reimbursement of relocation expenses that were incurred

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[1] *Second Report and Order* (FCC 97-48), WT Docket No. 95-157, released February 27, 1997, 62 *Fed. Reg.* 12752 (March 18, 1997).

[2] The following parties filed petitions for reconsideration and/or clarification in response to the *Second Report and Order*: American Petroleum Institute ("API"), UTC, and the South Carolina Public Service Authority ("Santee Cooper"). The Personal Communications Industry Association ("PCIA"), Pacific Bell Mobile Services ("PBMS"), and UTAM, Inc. ("UTAM") filed oppositions to the petitions. UTC and Southern Company ("Southern") filed comments on the petitions. The issues addressed in the instant *ex parte* presentation are limited to the five matters listed in the section entitled "Statement of Issues."

before the FCC's adoption of the *Second Report and Order*?[3]

2. Should self-relocating incumbents who elect to satisfy their communications requirements by using leased services in lieu of constructing replacement microwave facilities be entitled to recovery under the cost-sharing plan?

3. Should depreciation be included when computing the cost-sharing entitlements of self-relocating incumbents?

4. When the cost-sharing formula is applied to self-relocating incumbents, what is the appropriate value to be assigned for the first PCS licensee that incurs a cost-sharing obligation to the incumbent?

5. When applying the cost-sharing formula to a self-relocator, what date should be used as the date on which the self-relocator gains reimbursement rights?

ITA believes that the public policy considerations underlying these five issues are of critical importance to the success of the incumbent relocation process. In its position as a designated clearinghouse for the PCS/microwave incumbent relocation cost-sharing program, ITA has gained a unique perspective on the proper functioning of the cost-sharing program. As a result, ITA believes it is uniquely positioned to offer a useful, coherent and balanced commentary on the issues underlying this proceeding. For this reason, ITA takes this opportunity to provide its insights and observations for the Commission's consideration.

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[3] The adoption of the *Second Report and Order* is significant for purposes of defining incumbent reimbursement rights because, prior to that decision, incumbents could claim no right to reimbursement under the Commission's rules. In the *Second Report and Order*, the Commission amended Section 24.245 of its rules to include provisions under which a "voluntarily relocating microwave incumbent" is entitled to participate in the incumbent relocation cost-sharing program. *See* 47 C.F.R. §24.245 (1997). The *Second Report and Order* was adopted on February 13, 1997 and became effective on May 17, 1997.

II. Relocation Expenses Incurred By Incumbents Before the *Second Report and Order*

Under existing rules, PCS relocators are entitled to reimbursement for all relocation expenses incurred since April 5, 1995. The issue has been raised as to whether self-relocating incumbents should be entitled to the same rights or, alternatively, whether the cost-sharing rights of self-relocators extend only to the costs incurred after the Commission amended its rules, by means of the *Second Report and Order*, to include self-relocators in the cost-sharing program.

A. Discussion

API, Santee Cooper, UTC and Southern advocate that the April 5, 1995 date for computing relocation expenses be applied equally to PCS relocators and self-relocating incumbents. On the other hand, PCIA believes that incumbent self-relocators should be entitled to reimbursement only for costs incurred after the *Second Report and Order*. PCIA recognizes that, before adoption of the *Second Report and Order*, some incumbents may have entered into relocation agreements with PCS licensees that did not encompass all of the critical links in the incumbents' microwave networks. PCIA suggests, however, that it was irresponsible for incumbent licensees to agree to negotiated relocation settlements that did not encompass all of their critical microwave links. Such partial settlements, PCIA argues, are inconsistent with the rules requiring replacement microwave systems to be comparable to the systems being displaced.

B. ITA's Recommended Approach

ITA believes that incumbent licensees who voluntarily, and without any external impetus, incurred relocation expenses before the *Second Report and Order* should have to live with the consequences of their decision to relocate. Incumbents who fall in this category had neither expectations nor assurances of reimbursement at the time the expenses were incurred. Prudent business planning would dictate, therefore, a "wait and see" approach with respect to voluntary relocation.

Clearly, however, there were situations in which incumbents entering into relocation agreements with PCS licensees found it necessary to pay to self-relocate some of the affected links. Santee Cooper, for example, notes that PCS licensees may have lacked the funds to relocate an entire microwave system, or simply

may have been unwilling to relocate the entire network. Alternatively, incumbents may have found it necessary to replace microwave links that were not encompassed within the PCS/incumbent relocation agreement in order to avoid technical or operational problems associated with mixing old analog and new digital paths.

ITA urges the Commission to draw a distinction between (1) situations in which a microwave licensee voluntarily, and without any compelling operational need, elected to self-relocate and (2) situations, such as those described by Santee Cooper, in which incumbent microwave licensees had to self-relocate selected links in order to preserve the operational integrity of a network that was subject to a relocation agreement. In the first situation, the self-relocation would have been truly voluntary; in the second situation, the self-relocation would have been an operational necessity.

In summary, it is ITA's view that, in situations where microwave licensees self-relocated links as part of a system-wide replacement initiated by an agreement with one or more PCS licensees, the microwave licensees should be entitled to recover all expenses of relocation incurred after April 5, 1995. Conversely, in situations where the self-relocation was truly voluntary and not part of a system-wide replacement initiated by a PCS/incumbent relocation agreement, microwave licensees should be entitled to recover only those costs incurred after the *Second Report and Order*.

III. Recovery by Incumbents Using Leased Services

Some incumbent licensees have chosen to self-relocate their 2 GHz communications to leased services instead of waiting to enter into relocation agreements with PCS relocators. The question has been raised as to whether incumbents who elect to use leased services are entitled to participate in cost-sharing.

A. Discussion

API takes the view that incumbents who have self-relocated their communications to leased services have helped to expedite the deployment of PCS systems and should be permitted to participate in cost-sharing.[4] PCIA opposes this view, stating that participation by those who lease services will undermine the reliability of the third-party appraisal required by the Commission.[5]

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[4] API Petition, page 8.

[5] PCIA Reply, page 5.

B. ITA's Recommended Approach

The Commission's purpose in extending reimbursement rights to self-relocators, was to "accelerate the relocation process by promoting system-wide relocations."[6] Viewed from this perspective, ITA does not believe there is a credible basis on which to distinguish between relocation efforts premised on the construction of replacement microwave facilities and relocation efforts premised on the use of leased services. In both cases, the relocations will accelerate the 2 GHz band-clearing effort and facilitate the implementation of PCS services.

Accordingly, ITA urges the Commission to extend participation in the cost-sharing program to those incumbents who may relocate their systems to leased services. This approach is equitable and helps to promote the objectives of the relocation proceeding. To ensure fairness to PCS licensees, ITA recommends that, in the case of relocations to leased services, the FCC impose a defined cap on the level of incumbent expenses that would be subject to reimbursement. ITA suggests that the cap should be comparable to the cost that would have been incurred if the incumbent licensees had paid to self-relocate their systems to an alternate microwave frequency band.[7]

IV. Depreciation of Self-relocated Systems

The Commission's rules provide that the cost-sharing formula, as applied to self-relocating microwave incumbents, should include depreciation.[8] Some of the petitioners question the propriety of including depreciation.

A. Discussion

The Commission's rationale for including depreciation in the cost-sharing formula for incumbent licensees is that incumbents who voluntarily relocate may well obtain benefits that would not have been realized if they had waited to be relocated by a PCS licensee. Among the benefits cited by the Commission are more flexibility in

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[6] *Second Report and Order*, WT Docket No. 95-157, para. 25.

[7] The dollar amount representing the cost of relocating an incumbent system to alternate microwave frequency bands would, of course, be subject to the applicable per-link cap set forth in the Commission's rules.

[8] *Second Report and Order*, para. 27.

obtaining alternative spectrum, greater control over the relocation process, and elimination of operational uncertainty. In the Commission's view, the intent of including depreciation is to make sure that self-relocators pay for these benefits directly rather than pass the value of the benefits on as an element of the costs to be absorbed by eventual PCS relocators. The Commission also stated that the inclusion of depreciation provides an incentive for self-relocators to minimize the costs of relocation.

API and Santee Cooper disagree with the Commission's approach. API argues that the inclusion of depreciation eliminates the incentive of incumbents to self-relocate. Similarly, Santee Cooper states that microwave incumbents would be more likely to clear paths voluntarily if they were to reimbursed without consideration of depreciation. Santee Cooper also argues that inclusion of depreciation is unnecessary as an incentive for self-relocators to minimize relocation costs because there are an abundance of other, more compelling incentives to control relocation costs.

B. ITA's Recommended Approach

ITA believes it is appropriate to include depreciation when applying the cost-sharing formula to incumbent self-relocators. It is accurate, as the Commission has noted, that early self-relocation produces benefits for the microwave licensee that are unrelated to the actual cost of relocation. When incumbents make the decision to self-relocate, they invariably do so in order to maximize their frequency selection options and ensure, at an early date, the stability of future operations.

By self-relocating their systems, microwave licensees obtain definite tangible benefits. Conversely, if the timing of the relocation decision were left to PCS relocators, the incumbents would not enjoy these benefits. ITA believes it is fair, therefore, to assign a value to the benefits of early relocation and to expect the self-relocating incumbents to absorb the approximate value of these benefits. Inclusion of depreciation in the cost-sharing formula accomplishes this result.

V. Numerical Value to be Assigned to the First PCS Licensee Incurring a Reimbursement Obligation

At stake in this issue is the maximum amount of the reimbursement that an incumbent could obtain in a situation where there may be one, and only one, PCS relocator. API urges that the variable "N" in the cost-sharing formula should equal "1" for the first PCS licensee that would have interfered with the self-relocated link.

A. Discussion

As used in the cost-sharing formula, the term "N" represents the number of PCS licensees that would have interfered with the link. API expresses concern that, unless the Commission assigns a value of "1" to "N" in the case of a self-relocator, the formula would "make a mockery of the basic right of microwave incumbents to receive full compensation for their relocation costs."[9] This is so, API asserts because if the Commission assigns a value of "2" to "N", the maximum reimbursement that an incumbent could ever receive under the cost-sharing plan from the first (and perhaps only) interfering PCS licensee would be one-half of the relocation costs.

B. ITA's Recommended Approach

ITA believes that, in the case of a self-relocator, the variable "N" should be assigned the value of "1" for the first PCS licensee that incurs a cost-sharing obligation to the incumbent. Otherwise, there would be an inherently unfair and costly disadvantage imposed on self-relocating incumbents. In turn, this disadvantage would act to discourage self-relocation efforts, thereby undermining one of the principal objectives of allowing self-relocators to participate in cost-sharing.

VI. "Date of Reimbursement Rights" for Self-Relocation Cost-Sharing Computations

One of the underlying considerations affecting several of the issues raised on reconsideration/clarification is the date to be used for identifying when a self-relocator obtains reimbursement rights. Under existing rules, PCS relocators obtain reimbursement rights on the date on which the relocation agreement is signed. There is no comparable date for self-relocators. Nonetheless, for proper implementation of the cost-sharing formula, there must be a readily identifiable date on which self-relocators are considered to have gained reimbursement rights.

A. Discussion

There are two dates that arguably could apply, one being the date on which a self-relocator's replacement system is capable of operation and the other being the date on which the self-relocator deactivates the displaced microwave system.

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[9] API Petition, page 12.

B. ITA's Recommended Approach

In ITA's view, fundamental fairness dictates that the date on which a self-relocating microwave licensee gains reimbursement rights should be the date on which the licensee deactivates the system being displaced. So long as an incumbent continues to maintain an existing microwave system in operation or uses it as a standby for its new system, the incumbent cannot be considered to have abandoned the displaced system. Accordingly, ITA urges the Commission to specify that the date of system deactivation will serve as the date on which a self-relocator gains reimbursement rights.

* * * * *

The Industrial Telecommunications Association, Inc. offers its views on the matters discussed above in the hope of promoting an equitable and prompt resolution of the issues raised in the various petitions now pending before the Commission. ITA appreciates the opportunity to submit this *ex parte* presentation for the Commission's consideration. If there should be any questions regarding the views presented herein, please do not hesitate to contact the undersigned.

Very truly yours,

Mark E. Crosby
President and Chief
Executive Officer

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Frederick J. Day, Esq.

cc: Office of the Secretary
Chairman Reed E. Hundt
Commissioner James Quello
Commissioner Susan Ness
Commissioner Rachelle Chong
Chief, Wireless Telecommunications
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CERTIFICATE OF SERVICE

I, Barbara Levermann, an employee of the Industrial Telecommunications Association, Inc., hereby certify that I have this date, June 10, 1997, mailed a copy of the foregoing *ex parte* statement via first class U.S. mail, postage prepaid, to the following:

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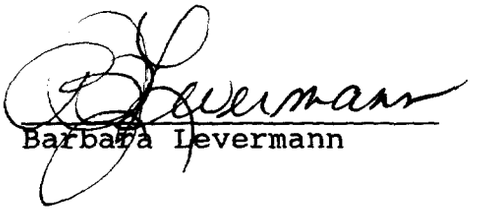

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